

administrative record, but both parties may interpret, clarify or explain issues and information contained in the record.

(g) *Applicability of appeal decisions.* Because a decision to determine geographic jurisdiction, deny a permit, or condition a permit depends on the facts, circumstances, and physical conditions particular to the specific project and/or site being evaluated, appeal decisions would be of little or no precedential utility. Therefore, an appeal decision of the division engineer is applicable only to the instant appeal, and has no other precedential effect. Such a decision may not be cited in any other administrative appeal, and may not be used as precedent for the evaluation of any other jurisdictional determination or permit application. While administrative appeal decisions lack precedential value and may not be cited by an appellant or a district engineer in any other appeal proceeding, the Corps goal is to have the Corps regulatory program operate as consistently as possible, particularly with respect to interpretations of law, regulation, an Executive Order, and officially-promulgated policy. Therefore, a copy of each appeal decision will be forwarded to Corps Headquarters; those decisions will be periodically reviewed at the headquarters level for consistency with law, Executive Orders, and policy. Additional official guidance will be issued as necessary to maintain or improve the consistency of the Corps' appellate and permit decisions.

#### **§ 331.8 Timeframes for final appeal decisions.**

The Division Engineer will make a final decision on the merits of the appeal at the earliest practicable time, in accordance with the following time limits. The administrative appeal process is initiated by the receipt of an RFA by the division engineer. The Corps will review the RFA to determine whether the RFA is acceptable. The Corps will notify the appellant accordingly within 30 days of the receipt of the RFA in accordance with § 331.7(b). If the Corps determines that the RFA is acceptable, the RO will immediately request the administrative record from the district engineer. The

division engineer will normally make a final decision on the merits of the appeal within 90 days of the receipt of an acceptable RFA unless any site visit is delayed pursuant to § 331.7(c). In such case, the RO will complete the appeal review and the division engineer will make a final appeal decision within 30 days of the site visit. In no case will a site visit delay extend the total appeal process beyond twelve months from the date of receipt of an acceptable RFA.

#### **§ 331.9 Final appeal decision.**

(a) In accordance with the authorities contained in § 331.3(a), the division engineer will make a decision on the merits of the appeal. While reviewing an appeal and reaching a decision on the merits of an appeal, the division engineer can consult with or seek information from any person, including the district engineer.

(b) The division engineer will disapprove the entirety of or any part of the district engineer's decision only if he determines that the decision on some relevant matter was arbitrary, capricious, an abuse of discretion, not supported by substantial evidence in the administrative record, or plainly contrary to a requirement of law, regulation, an Executive Order, or officially promulgated Corps policy guidance. The division engineer will not attempt to substitute his judgment for that of the district engineer regarding a matter of fact, so long as the district engineer's determination was supported by substantial evidence in the administrative record, or regarding any other matter if the district engineer's determination was reasonable and within the zone of discretion delegated to the district engineer by Corps regulations. The division engineer may instruct the district engineer on how to correct any procedural error that was prejudicial to the appellant (*i.e.*, that was not a "harmless" procedural error), or to reconsider the decision where any essential part of the district engineer's decision was not supported by accurate or sufficient information, or analysis, in the administrative record. The division engineer will document his decision on the merits of the appeal in writing, and provide a copy of this decision to the

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applicant (using certified mail) and the district engineer.

(c) The final decision of the division engineer on the merits of the appeal will conclude the administrative appeal process, and this decision will be filed in the administrative record for the project.

### § 331.10 Final Corps decision.

The final Corps decision on a permit application is the initial decision to issue or deny a permit, unless the applicant submits an RFA, and the division engineer accepts the RFA, pursuant to this Part. The final Corps decision on an appealed action is as follows:

(a) If the division engineer determines that the appeal is without merit, the final Corps decision is the district engineer's letter advising the applicant that the division engineer has decided that the appeal is without merit, confirming the district engineer's initial decision, and sending the permit denial or the proffered permit for signature to the appellant; or

(b) If the division engineer determines that the appeal has merit, the final Corps decision is the district engineer's decision made pursuant to the division engineer's remand of the appealed action. The division engineer will remand the decision to the district engineer with specific instructions to review the administrative record, and to further analyze or evaluate specific issues. If the district engineer determines that the effects of the district engineer's reconsideration of the administrative record would be narrow in scope and impact, the district engineer must provide notification only to those parties who commented or participated in the original review, and would allow 15 days for the submission of supplemental comments. For permit decisions, where the district engineer determines that the effect of the district engineer's reconsideration of the administrative record would be substantial in scope and impact, the district engineer's review process will include issuance of a new public notice, and/or preparation of a supplemental environmental analysis and decision document (see 33 CFR 325.7). Subsequently, the district engineer's decision made pur-

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suant to the division engineer's remand of the appealed action becomes the final Corps permit decision. Nothing in this part precludes the agencies' authorities pursuant to Section 404(q) of the Clean Water Act.

### § 331.11 Unauthorized activities.

Approved JDs, permit denials, and declined permits associated with after-the-fact permit applications are appealable actions for the purposes of this part. If the Corps accepts an after-the-fact permit application, an administrative appeal of an approved JD, permit denial, or declined permit may be filed and processed in accordance with these regulations subject to the provisions of paragraphs (a), (b), and (c) of this section. An appeal of an approved JD associated with unauthorized activities will normally not be accepted unless the Corps accepts an after-the-fact permit application. However, in rare cases, the district engineer may accept an appeal of such an approved JD, if the district engineer determines that the interests of justice, fairness, and administrative efficiency would be served thereby. Furthermore, no such appeal will be accepted if the unauthorized activity is the subject of a referral to the Department of Justice or the EPA, or for which the EPA has the lead enforcement authority or has requested lead enforcement authority.

(a) *Initial corrective measures.* If the district engineer determines that initial corrective measures are necessary pursuant to 33 CFR 326.3(d), an RFA for an appealable action will not be accepted by the Corps, until the initial corrective measures have been completed to the satisfaction of the district engineer.

(b) *Penalties.* If an affected party requests, under this Section, an administrative appeal of an appealable action prior to the resolution of the unauthorized activity, and the division engineer determines that the appeal has no merit, the responsible party remains subject to any civil, criminal, and administrative penalties as provided by law.

(c) *Tolling of statute of limitations.* Any person who appeals an approved JD associated with an unauthorized activity or applies for an after-the-fact permit,